

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

17 CR 676 (DLC)

5 PHILIP JACOBY,

6 Defendant.

7 -----x  
8 New York, N.Y.  
9 February 2, 2018  
11:00 a.m.

10 Before:

11 HON. DENISE COTE,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN  
15 Interim United States Attorney for the  
16 Southern District of New York

17 DANIEL TEHRANI  
18 REBECCA MERMELSTEIN  
19 BRENDAN QUIGLEY

Assistant United States Attorneys

20 KING SPALDING  
Attorneys for Defendant

21 BY: WILLIAM JOHNSON

22 ALSO PRESENT: JIN TAE KIM, United States Postal Inspector  
23  
24  
25

1 (Case called)

2 THE DEPUTY CLERK: Is the government ready to proceed?

3 MR. TEHRANI: Yes. Good morning, your Honor. Daniel  
4 Tehrani, Rebecca Marmelstein, and Brendan Quigley for the  
5 government. With us at counsel table is Postal Inspector Jin  
6 Kim.

7 THE COURT: Thank you.

8 For Mr. Jacoby, are you ready to proceed?

9 MR. JOHNSON: Yes, your Honor. William Johnson from  
10 King Spalding on behalf of Mr. Jacoby who is with me at counsel  
11 table.

12 THE COURT: Welcome, everyone.

13 So, Mr. Johnson, have you and your client both read  
14 the presentence report?

15 MR. JOHNSON: Yes, your Honor.

16 THE COURT: Have you discussed it with each other?

17 MR. JOHNSON: Yes, we have.

18 THE COURT: Do you have any objections to it other  
19 than what might be contained in your written sentencing  
20 submissions to me?

21 MR. JOHNSON: No, your Honor.

22 THE COURT: Thank you.

23 The presentence report is made a part of this record  
24 and placed under seal. If an appeal is taken, counsel on  
25 appeal may have access to the sealed report without further

1 application to this Court.

2           There is agreement here that the offense level is 9,  
3 the criminal history category is I, and the guidelines range is  
4 4 to 10. I've reviewed all of those calculations and adopted  
5 them as my own.

6           I have submissions from the parties. I have the  
7 government's sentencing submission filed on January 26, and I  
8 have the defendant's sentencing submission of January 19. Some  
9 personal sensitive information has been redacted from the  
10 publicly filed document.

11           Have you, Mr. Johnson, provided the redacted material  
12 to Ms. Rojas for filing under seal?

13           MR. JOHNSON: Yes. I need to double-check that,  
14 your Honor. I know we provided it to chambers. I need to make  
15 sure that it's in your file.

16           THE COURT: If you could coordinate with my deputy  
17 after this to make sure that everything has been filed  
18 appropriately in this court.

19           There is a request here for a non-guideline sentence  
20 based on the defendant's health and also arguments with respect  
21 to the fact that this conduct was aberrational, given his life  
22 story. I've read the materials. I'm prepared to hear from the  
23 parties.

24           Mr. Tehrani, did you wish to add to the government's  
25 sentencing submission?

1 MR. TEHRANI: No, your Honor. As we set forth in our  
2 submission, we obviously view this as a very serious offense.  
3 It is an officer of a public company who not only lied but  
4 fabricated documentation in order to deceive auditors. We  
5 believe that's conduct that warrants serious punishment.

6 But rather than belabor the arguments that we made in  
7 our sentencing submission, unless the Court has any particular  
8 question, we're prepared to rest on our submission.

9 THE COURT: Thank you.

10 Mr. Johnson.

11 MR. JOHNSON: Your Honor, if I could address the  
12 Court. I just recently had some surgery. My voice is not --  
13 could I use the podium?

14 THE COURT: Absolutely.

15 MR. JOHNSON: Thank you.

16 I'll try to be brief, your Honor. We are seeking a  
17 sentence of probation. We think that the essence of the  
18 offense here is that Mr. Jacoby regrettably prepared a one-page  
19 back-dated memo to support recognition of revenue that was  
20 subsequently given to his auditor.

21 We think the key point is that he has fully  
22 acknowledged that was improper. He has not been charged with  
23 accounting fraud. The government investigated that, and we  
24 think that the circumstances do indicate that at least he  
25 believed, even if he was wrong, that he had a good-faith basis

1 for believing the timing of the recognition of the revenue does  
2 not justify what he did and only explains his reasons for doing  
3 that.

4 But I do want to address the strength of the  
5 government's arguments in response to our request for a  
6 non-guideline sentence. They say that his conduct was  
7 particularly pernicious and have compared it to Enron,  
8 WorldCom, and Tyco.

9 I happen to know obviously that this Court presided  
10 over the WorldCom massive civil litigation that resulted in  
11 historic settlements. I personally tried the WorldCom criminal  
12 case. This case is not WorldCom, and it's not Enron.  
13 Mr. Jacoby, respectfully -- he's not Scott Sullivan or Andy  
14 Fastow. I won't belabor it, but that's not even close.

15 He shouldn't have done what he did. It is a clear  
16 aberration. I think, again, as a way of explaining, he  
17 believed he had a basis based on verbal discussions with the  
18 distributor.

19 We're not here to try that. He was not charged with  
20 accounting fraud, and we don't think that he should be  
21 sentenced based on a belief that he engaged in accounting  
22 fraud.

23 The company settled with the SEC for \$1.5 million.  
24 Again, this is not an Enron or WorldCom situation. We think  
25 based on the facts as they played out, the memo, as bad as it

1 was, as a mistake in judgment as it was, ultimately criminal as  
2 it was, had no effect on the company.

3 The very next day after Mr. Jacoby submitted the memo,  
4 the company came out with a press release disavowing the  
5 revenue. They had already decided what they were going to do,  
6 and in public companies, 24 hours is not a long enough time to  
7 evaluate all the circumstances of accounting issues.

8 They had already done that before. They knew what  
9 they were going to do. They gave him one last chance to  
10 justify it. He gave them what he gave them, they didn't  
11 believe it, and they went the other way.

12 The government says in its memo that it doesn't matter  
13 that he was unsuccessful in deceiving the auditors. I  
14 guarantee you that if he had deceived them for a year or more  
15 or longer, they would be standing here in front of you telling  
16 you that you should sentence him to a longer sentence, or they  
17 would be arguing it stronger because of the length of that  
18 deception. It didn't happen here in that way.

19 With respect to Mr. Jacoby's personal circumstances,  
20 we submit that the information in the PSR and the information  
21 we've submitted show that this crime was truly an aberration in  
22 his life, and I don't think the government disputes this point.

23 He has letters from friends and colleagues that show  
24 he's a kind and generous man. He's a hard-working professional  
25 who took not just pride in his own work but in the work that

1 his company was doing to help provide and develop therapeutic  
2 products for patients.

3 He has fully accepted responsibility here. He entered  
4 a preindictment plea and did not waste the government's time  
5 when they approached us and readily agreed to plead guilty to  
6 the charge. He has no criminal history.

7 We think that separate and apart from the Court's view  
8 and the government's view about the accounting revenue  
9 questions, his declining health is an important sentencing  
10 consideration that we believe, in combination with the other  
11 factors, would suggest that probation is appropriate.

12 Incarceration would likely exacerbate his condition.  
13 The probation department seems to agree. There is no risk of  
14 him being a recidivist for many reasons but certainly because  
15 of his health.

16 He was medically retired from Osiris before this case  
17 came up. His health has declined since then. We think that he  
18 has learned his lesson. Even regardless of that, he will never  
19 be in a position to do something like this again.

20 With respect to the point that I think is the most in  
21 contention, general deterrence, we don't think that a sentence  
22 of incarceration is required to serve that purpose.

23 The government says that a minimal sentence would  
24 shake the public's confidence in the integrity of the public  
25 markets. I think the facts of this case don't support that

1 extreme statement.

2           If there really is anyone out there who is watching  
3 this case and considering how to interact with a public company  
4 auditor, we think they've already gotten the message, if you  
5 lie, the government will pursue you, they will charge you, and  
6 you will be a felon for the rest of your life, and you will  
7 lose your career in the process.

8           We certainly don't think, as the government submits,  
9 that a reasonable person would look at all the facts here and  
10 actually be emboldened to commit a crime were Mr. Jacoby be  
11 sentenced to probation.

12           So, for all those reasons, we would request that the  
13 Court sentence him to probation. With respect to other  
14 portions of sentencing as to a fine, probation has recommended  
15 a fine of \$10,000. We'd ask that a lesser amount be imposed,  
16 if the Court is inclined to do so.

17           As we noted in our memo, he is a defendant in an SEC  
18 action, as well as multiple other parallel suits. There he  
19 faces potential judgments and other financial penalties.

20           Even putting those aside, he will face significant  
21 legal costs. After he pleaded guilty, his company refused to  
22 pay several months of past legal bills for our firm and has cut  
23 off any further advancement and indemnification of fees in  
24 connection with all of his other litigation.

25           As the Court is aware and as the PSR states, he and



1 his wife have and will continue to have various financial  
2 liabilities relating to the child custody suit with his wife's  
3 former husband, and his longterm financial picture will almost  
4 certainly get worse in the near future.

5 As the PSR notes, his disability payments will cease  
6 when he turns 67 next year, and what he will have left from  
7 Social Security benefits, IRA funds, and other assets will not  
8 come close to making up the difference of that money that he is  
9 getting now.

10 The final point I'd like to make is with respect to  
11 the probation department's recommendation for a special  
12 condition of alcohol testing and treatment, we don't think that  
13 that's necessary respectfully.

14 THE COURT: I'm not considering that.

15 MR. JOHNSON: You're not?

16 THE COURT: I'm not.

17 MR. JOHNSON: Then I will stop, your Honor, unless you  
18 have any questions.

19 THE COURT: No.

20 MR. JOHNSON: Thank you.

21 THE COURT: Mr. Jacoby, is there anything that you  
22 wish to say to me on your behalf in connection with your  
23 sentence? Sir, if you want to remain seated, you may.

24 THE DEFENDANT: I'll stand. Thank you, your Honor.

25 I would like to say that I'm truly sorry for what I've

1 done. I know that it's wrong to submit a back-dated memo to  
2 the auditors, and I don't really have a good answer for why  
3 I've done this.

4 The best I can say -- this is just a reason, but it's  
5 not an excuse -- is that I wrote the memo because I was really  
6 frustrated with the auditors, BDO. We had honestly briefed BDO  
7 of the details of the transactions in question during their  
8 audit before the PCAOB reviewed. They signed off on it, and  
9 the audit was completed without any problems related to that  
10 transaction.

11 I know that people have since disagreed with how we  
12 accounted for that revenue, and I thought it was proper to book  
13 it when we did because I thought I had at least a verbal  
14 agreement on all the important terms of the transaction.

15 I got extremely frustrated with BDO questioning months  
16 and months after they initially reviewed it and apparently  
17 found no problems with the accounting. I let my frustrations  
18 get the better of my judgment, but I know that's not an excuse,  
19 and I have no one but myself to blame for this.

20 I should not have done what I did, no matter what the  
21 circumstances. I've tried to lead an honest life and have an  
22 honorable career. I've been able to do that up until this  
23 incident. I still can't believe I let myself do something like  
24 this, and I'm appalled and ashamed that I did.

25 It's been difficult for me to come to grips with this,

1 particularly because I'm not healthy enough to work anymore and  
2 I won't have the opportunity to earn back the trust of people  
3 in the way I know best, working hard, helping people, and  
4 trying to do the right thing.

5 I would like to thank my family and friends who have  
6 supported me. I've had a really hard time talking about this  
7 and didn't even let them know about it until very recently.  
8 I've been truly touched by the letters of support from them,  
9 and I want to apologize for letting them down.

10 I have learned an extremely important and valuable  
11 lesson and wish all of this had never happened. I understand  
12 you need to impose a sentence, and I simply ask for the mercy  
13 of the Court. Thank you, your Honor.

14 THE COURT: So, Mr. Jacoby, I am going to impose a  
15 sentence of time served to be followed by a term of supervised  
16 release to follow of two years.

17 Besides the standard conditions, I'm going to require  
18 that the additional condition be that you pay a fine of  
19 \$10,000. I decline to reduce the fine amount below that  
20 recommended by the probation department. I think that payment  
21 of a fine here is an important component of the sentence. And  
22 I impose a special assessment of \$100.

23 You may be seated. I want to explain why I'm imposing  
24 the sentence that I am.

25 It's absolutely criminal and wrong from every

1 perspective to fabricate a document; to involve a third party,  
2 the distributor, in the fraudulent conduct; to mislead  
3 auditors; to essentially ultimately understand that a false  
4 record will have an impact on the financial standing of the  
5 company, and it's a public company. So the ramifications, the  
6 ripple effect of this kind of fraud, are significant.

7           However, I am very influenced here by your health.  
8 I'm very influenced by the scope of the criminal activity, how  
9 long it lasted, the nature of it, compared to the entirety of  
10 your career.

11           I'm glad that you were prosecuted for this. I'm glad  
12 the extent of the criminal conduct is spread on the record and  
13 available for others to learn from. The penalty at this point  
14 in your life is one that you will suffer from, perhaps, for the  
15 rest of your life as the impact of this plays out in a variety  
16 of ways.

17           Do I need to send you to prison also? No. There is  
18 no reason here, in terms of individual deterrence, to send you  
19 to prison. I am convinced that even if you were working, you  
20 would never do this again.

21           In terms of appropriate punishment, given the context  
22 of everything I've just described, the punishment I'm imposing  
23 is sufficient and appropriate.

24           In terms of general deterrence, well, that is a  
25 problem because this is serious criminal activity. It deserves

1 to be punished. People need to be deterred. This is wrongful.  
2 But that's only one component here of a sentence.

3 I thought about that, and weighing your age and health  
4 and all of the challenges that you face because of your health,  
5 the fact that you're working days are over, the fact that this  
6 is the only criminal activity for which you will have been  
7 convicted in a long working career -- all of those factors tell  
8 me that while a fine is appropriate, a financial penalty is  
9 appropriate, sending you to prison at this time would not be  
10 appropriate.

11 I want to advise you of your right to appeal. If  
12 you're unable to pay the cost of an appeal, you may apply for  
13 leave to appeal in forma pauperis. Any notice of appeal must  
14 be filed within 14 days of the judgment of conviction.

15 Mr. Tehrani, are there any open counts?

16 MR. TEHRANI: There are not, your Honor.

17 THE COURT: With respect to payment of the fine, it  
18 should be paid within 60 days. I'm declining to impose a  
19 special term of supervised release related to alcohol use.

20 I think that the defendant is under the supervision of  
21 several physicians for serious health conditions. They are the  
22 persons most directly involved with his healthcare, including  
23 any abuse of substances. I leave it to them to take care of  
24 Mr. Jacoby's health situation.

25 Thank you, all.